

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON TURNBORE,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 200911
Recorder's Court
LC No. 96-001846

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEVAR PERKINS,

Defendant-Appellant.

No. 201881
Recorder's Court
LC No. 96-001846

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

We consider the consolidated appeals as of right of defendants, Levar Perkins and Jon Turnbore. A jury convicted defendants for offenses relating to their participation in a complex series of events including the most severe forms of mayhem, robbery, kidnapping and assault. The issues on appeal are defendants' claims of double jeopardy and trial court abuse of discretion in sentencing. We affirm.

I. Basic Facts and Procedural History

In January of 1996, McKinley Allen and his brother, Robert Allen, returned to their apartment in Detroit, after a family gathering. As they were entering their apartment, an upstairs tenant yelled to them through the window that one Diarra Bryant was attempting to contact McKinley Allen. McKinley Allen then went to the tenant's apartment to phone Bryant. Bryant apparently needed money and offered to sell McKinley Allen \$200 worth of drugs for which he would be paid \$250 the following day, after McKinley Allen received his retirement check. McKinley Allen declined the offer and then returned to his apartment to watch television with his brother. Out of this seemingly simple event, there arose a melange of violence and coercion, including a brutal and cold-blooded murder, armed robbery, kidnapping and assault with intent to rob while armed.

Approximately one-half hour after the fateful phone call, Bryant and defendant Levar Perkins arrived at the Allens' apartment. McKinley Allen and Bryant went into one of the bedrooms, apparently to discuss the potential drug transaction. Defendant Perkins stood in the living room in front of the door, and Robert Allen continued to watch television. McKinley Allen apparently again declined Bryant's offer, and both he and Bryant left the bedroom. McKinley Allen sat down to watch television, while Bryant walked toward the door. McKinley Allen heard the sound of a gun cocking. He then saw Bryant run behind Robert Allen and shoot him in the back of the head, killing him.

As McKinley Allen attempted to get out of his chair, Bryant ran up to him, pointed the gun in his face and then handed the gun to defendant Perkins. McKinley began to cry and shake, whereupon defendant Perkins told him to "stop crying because if [we] wanted you dead, you'd be dead." McKinley Allen asked Bryant why he had shot his brother, and Bryant responded, "I didn't like the fat m* * * * *r no way."¹ Bryant asked McKinley Allen if Robert Allen had any money. McKinley Allen denied that he did and Bryant then searched through Robert Allen's pockets, finding McKinley Allen's car keys.

Defendant Turnbore then arrived at the apartment and was admitted. Bryant left to retrieve McKinley Allen's license and registration from McKinley Allen's automobile, leaving the gun with defendant Perkins with instructions to hold it on McKinley Allen. Bryant returned with some documents, retrieved the title to McKinley Allen's automobile from McKinley Allen's briefcase, told McKinley Allen that he wanted his automobile, put the gun in McKinley Allen's face and demanded that McKinley Allen sign the title over to him. Not surprisingly, given the fact that Bryant had just killed his brother, McKinley Allen complied.

During this time, Bryant, defendant Perkins and defendant Turnbore milled around the apartment, with Bryant bragging to defendant Perkins and defendant Turnbore about the killing. According to McKinley Allen, Bryant, defendant Perkins and defendant Turnbore acted as if they were at a party: Bryant smoked a cigarette and, knowing that Robert Allen disliked cigarette smoke while he was alive, blew smoke into Robert Allen's face and asked him "how you like the smoke, Robert?"

In yet another variation on the overall theme of violence and coercion, Bryant, apparently knowing that McKinley Allen had a bank card that allowed him twenty-four hour access to his bank account, demanded the bank card from him. McKinley Allen told Bryant that his girlfriend Denise Thompson had the bank card. Bryant then forced McKinley Allen to get into his automobile and, with

defendant Perkins carrying the gun, drove to Thompson's house, while defendant Turnbore remained in the apartment. Thompson, angry that McKinley Allen had brought strangers to her house, told him that she did not have his bank card. Bryant, McKinley Allen and defendant Perkins then got back into the car and returned to the apartment.

In a final spasm of intimidation and violence, Bryant, knowing that funds were directly deposited into McKinley Allen's bank accounts on the first and third of every month, decided that he, defendant Perkins and defendant Turnbore would hold McKinley Allen in the apartment overnight and then force him to go to the bank in the morning to make a withdrawal from these bank accounts. During this time, Bryant would occasionally leave the apartment and the gun would pass between defendant Perkins and defendant Turnbore.

At approximately 9:00 a.m. the next day, Bryant directed McKinley Allen and defendant Turnbore to get into the car and go with him to the bank, while defendant Perkins remained in the apartment. Bryant drove, while defendant Turnbore, holding the gun, sat in the back seat behind McKinley Allen. When they arrived at the bank, Bryant, McKinley Allen and defendant Turnbore went inside. Bryant and defendant Turnbore stayed in the back of the bank lobby while McKinley Allen got into line. With Bryant and defendant Turnbore out of earshot, McKinley Allen told the man standing in line in front of him, one Troque Halliburgh, that the two men in the bank had shot his brother and held him in his apartment all night. McKinley Allen asked Halliburgh to go to the front of the line, pretend to transact business and explain the situation to the teller. After asking McKinley Allen if he were "for real," Halliburgh complied, the first act of simple decency in this entire tragic and sordid affair.

Shortly thereafter, police officers arrived at the bank. Upon seeing them, defendant Turnbore fled. Bryant also attempted to flee, but the police officers apprehended him. McKinley Allen told the police officers that defendant Turnbore was also involved and had a gun; the police apprehended defendant Turnbore near the bank. While defendant Turnbore was not in possession of a gun when apprehended, a private citizen found a gun, later determined to be the murder weapon, on the street near the bank and turned it over to police.

While still at the bank, McKinley Allen told the police officers that two other individuals were in his apartment, that his brother had been shot and that his brother's body was also still in the apartment. The police subsequently arrested defendant Perkins and another individual, one Tujuan Wheeler, at the apartment. Needless to say, the police also found Robert Allen's body.

Bryant, defendant Perkins, defendant Turnbore and Wheeler were charged with first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, MCL 750.89; MSA 28.284, armed robbery, MCL 750.529; MSA 28.797, kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court severed Bryant's and Wheeler's cases,² and defendant Turnbore and defendant Perkins were tried together before separate juries.

The jury convicted defendant Perkins of assault with intent to rob while armed, MCL 750.89; MSA 28.284 (relating to the attempt to rob McKinley Allen of the proceeds of his bank accounts),

armed robbery, MCL 750.529; MSA 28.797 (relating to the taking of McKinley Allen's car), kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to concurrent terms of thirty-four years and four months to fifty-two years and nine months of imprisonment for the assault with intent to commit armed robbery, armed robbery, and kidnapping convictions, to be preceded by the mandatory two-year sentence for the felony-firearm conviction.

The jury convicted defendant Turnbore of accessory after the fact, MCL 767.67, MSA 28.1007, assault with intent to rob while armed, MCL 750.89, MSA 28.284 (relating to the attempt to rob McKinley Allen of the proceeds of his bank accounts), armed robbery, MCL 750.529, MSA 28.797 (relating to the taking of McKinley Allen's car), kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced him to concurrent terms of three to five years' imprisonment for the accessory conviction and eighteen to forty years' imprisonment for the assault with intent to commit armed robbery, armed robbery and kidnapping convictions, to be preceded by the mandatory two-year sentence for the felony-firearm conviction.

II. Standard of Review

A. Double Jeopardy

This Court reviews constitutional questions de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). "Both the federal and Michigan constitutions protect against multiple prosecutions and multiple punishments for the same offense. 'The double jeopardy prohibition does *not* operate to bar the prosecution of two dissimilar offenses that occur at different times.'" *People v Swinford*, 150 Mich App 507, 515; 389 NW2d 462 (1986), quoting *People v Johnson*, 94 Mich App 388, 391; 288 NW2d 436 (1979) (emphasis in the original).

B. Sentencing

Appellate review of sentencing is limited to determining whether the trial court abused its discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). "A sentence must 'be proportionate to the seriousness of the circumstances surrounding the offense and the offender'". *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992), quoting *Milbourn*, *supra* at 636. "Where the sentence is not proportionate, the sentencing court has abused its discretion." *Poppa*, *supra* at 187. "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Milbourn*, *supra* at 661. A trial court may depart from the guidelines when sentencing a defendant. *Id.* at 659.

Whenever the court determines that a minimum sentence outside the recommended minimum range [of the sentencing guidelines] should be imposed, the judge may do so. When such a sentence is imposed, the judge must explain on the sentencing information

report and on the record the aspects of the case that have persuaded the judge to impose a sentence outside the recommended minimum range. [MCR 6.425(D)(1).]

III. Double Jeopardy

Both defendants argue that their convictions for both armed robbery and assault with intent to rob while armed violate the protections against double jeopardy. They contend that these convictions violate double jeopardy because both crimes arose out of the taking of McKinley Allen's automobile and therefore amounted to a single transaction or crime. We hold, however, that the convictions for armed robbery and assault with intent to rob did *not* both arise out of the taking of McKinley Allen's automobile. Rather, the only conviction arising out of the taking of the automobile was the conviction for armed robbery.

The double jeopardy prohibition does *not* operate to bar prosecution of two dissimilar offenses that occur at separate times.

* * *

Even if the offenses share common elements or one constitutes a lesser offense of the other, there is no violation based on double prosecution if one crime is complete before the other takes place. [*Johnson, supra* at 391 (emphasis in the original).]

Here, Bryant, with defendant Perkins' assistance, forcibly obtained the title to McKinley Allen's automobile prior to the time they forced McKinley Allen to accompany them to his girlfriend's house in an effort to obtain his bank card. When their attempt to obtain the bank card was unsuccessful, they returned with McKinley Allen to the apartment and held him there for almost fifteen hours. Bryant and defendant Turnbore then forced McKinley Allen to accompany them to the bank in an attempt to have him withdraw funds from his bank accounts. Thus, the armed robbery of McKinley Allen's automobile was complete well before the attempt to rob him of the proceeds of his bank accounts. The latter assault did not, therefore, "form the basis for the prior robbery charge; each was a distinct offense merely arising out of the same transaction." *Id.*

In logic and in law, it matters not that the interval between the two offenses was five or ten minutes, five or ten days, or five or ten weeks. The Fifth Amendment is not, in our view, a *carte blanche* to commit a separate offense in immediate proximity in point of time and place to another separate offense. Defendant cannot escape prosecution for the later separate offense. [*Id.*, citing *People v Noth*, 33 Mich App 18, 29; 189 NW2d 779 (1971) (emphasis in the original).]

Accordingly, since one crime was complete prior to the commission of the next crime, we hold that double jeopardy does not operate to bar defendant Perkins' convictions for armed robbery and assault with intent to commit armed robbery. *Johnson, supra* at 391.

IV. Sentencing

A. Defendant Perkins

Defendant Perkins argues that the trial court abused its discretion when it denied defense counsel's objections to the scoring of the sentencing guidelines. He further argues that the trial court failed to articulate on the record sufficient reasons for departing from the sentencing guidelines. We review these claims to the extent they relate to defendant Perkins' claim that his sentence is disproportionate.

"Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied." *People v Raby*, 456 Mich 487, 498; 572 NW2d 644 (1998), citing *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997). "A putative error in the scoring of the sentencing guidelines is simply not a basis upon which an appellate court can grant relief." *Raby*, *supra* at 499. Thus, we are precluded from considering defendant Perkins' claims that the trial court misscored guidelines variables.

Furthermore, "[o]n postsentence review, guidelines departure is relevant solely for its bearing on the *Milbourn* claim that the sentence is disproportionate." *Id.* at 497, quoting *Mitchell*, *supra* at 177. Our review of the record reflects that the trial court adequately explained its reasons for departing from the guidelines and that defendant Perkins' sentences are proportionate. While the trial court departed from the sentencing guidelines, the sentences it imposed on defendant Perkins were "proportionate to the seriousness of the matter." *Milbourn*, *supra* at 661.

In sentencing defendant Perkins, the trial court noted that it was departing from the guidelines. The trial court also referred to the casually brutal manner in which defendant Perkins threatened McKinley Allen with a gun, telling him that if defendant Perkins had wanted him dead, he would be dead by now. The trial court also noted that defendant Perkins remained in the apartment with Robert Allen's dead body as if "nothing had happened." The trial court also considered defendant Perkins' age and that, by the age of eighteen, a person in an apartment where a murder had occurred and the dead body remained ought to know that he was "doing wrong." Finally, the trial court noted that this case presented an instance of "cold-blooded, callous, low-down, rotten, on-going conduct" and that this case was one of the most despicable cases it had seen in "my 15 years of listening to murder, rape, robbery and mayhem" cases. To put it mildly, we fully agree. In this case, arguments from the sentencing guidelines ignore the "uniquely perverse" nature of defendant Perkins' conduct. *Cf. People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994). We reiterate that "[A] guidelines' regime is not an adequate substitute for trial court discretion." *Id.* at 812.

We therefore hold that, while the departure from the sentencing guidelines was significant, the record reflects that the trial court considered the seriousness of the crimes and the cavalier attitude with which defendant Perkins committed them. The trial court correctly fashioned a sentence that was proportionate to the seriousness of the circumstances surrounding the offenses and the offender. *Poppa*, *supra* at 187.

B. Defendant Turnbore

Defendant Turnbore argues that his sentences, while within the sentencing guidelines range, were disproportionate. We hold, however, in contrast to defendant Turnbore's characterization, that the trial court did not sentence him as if he had been found guilty of first-degree felony murder, but rather made specific reference to the fact that the jury determined that a conviction for accessory after the fact was more appropriate than a conviction for felony murder. This holding is further supported by the fact that the trial court expressly stated that defendant Turnbore was *less culpable* than the other individuals who participated in the criminal activity.

In addition, in sentencing defendant Turnbore the trial court noted that, while he did not take part in the murder, he had no difficulty profiting from it. Finally, the trial court referred to the sentencing guidelines, stating that it was going to sentence defendant Turnbore at the high-end of the range. Thus, the trial court sufficiently explained its reasons for sentencing defendant Turnbore as it did. *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996). In light of the severity of the acts in which he participated, defendant Turnbore has failed to overcome the presumption that his sentence of eighteen to forty years was proportionate to the offense and the offender. *Id.* at 647 (sentence within the guidelines is presumptively proportionate). Accordingly, the trial court did not abuse its discretion and resentencing of defendant Turnbore is not warranted. *Milbourn, supra* at 630; *Poppa, supra* at 187.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Jane E. Markey

/s/ William C. Whitbeck

¹ We note that the only ostensible purpose for killing Robert Allen, apart from sheer blood lust, was to intimidate McKinley Allen so as to make him cooperate in turning his automobile, bank card and funds in his bank account over to Bryant and defendants.

² Bryant and Wheeler were both found guilty of crimes in connection with the regime of murder and terror that Bryant initiated. Both Bryant and Wheeler have appealed their convictions as of right, but those appeals are not before us.